U.S. Department of Labor

Office of Administrative Law Judges
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Mailed 12/12/00

IN THE MATTER OF:	*	
Hattie B. Dearman (Widow of D.A. Dearman) Claimant	*	
Against	*	Case No.: 1995-LHC-0319
Ingalls Shipbuilding, Inc. Employer	*	OWCP No.: 6-136563
and	*	
American Mutual Liability Insurance Company, In Liquidation, By And Through The Mississippi Insurance Guaranty Association Carrier	*	

APPEARANCES:

Robin Reid Boswell, Esq.
Scott O. Nelson, Esq.
For the Claimant

Donald P. Moore, Esq.
For the Employer/Carrier

BEFORE: **DAVID W. DI NARDI**
Administrative Law Judge

DECISION AND ORDER - DENYING BENEFITS

This is a claim for worker's compensation benefits under the Longshore and Harbor Workers' Compensation Act, as amended (33 U.S.C. §901, **et seq.**), herein referred to as the "Act." The hearing was held on March 28, 2000 in Gulfport, Mississippi, at which time all parties were given the opportunity to present evidence and oral arguments. The following references will be

used: TR for the official hearing transcript, ALJ EX for an exhibit offered by this Administrative Law Judge, CX for a Claimant's exhibit, JX for a Joint exhibit and EX for an exhibit offered by the Employer/Carrier. This decision is being rendered after having given full consideration to the entire record.

Post-hearing evidence has been admitted as:

Exhibit No.	**Item**	**Filing Date**
CX 38	April 7, 2000 letter from Attorney Lomax to Attorney Moore	04/13/00
EX 15	Attorney Moore's April 12, 2000 letter Filing	04/18/00
EX 16	Claimant's Response to Employer and Carrier's Supplemental Interrogatories, Requests for Production and Requests For Admissions	04/18/00
EX 17	Attorney Moore's letter suggest a briefing schedule	05/19/00
EX 18	Attorney Moore's letter requesting a short extension of time for the parties to file their post-hearing briefs	06/08/00
ALJ EX 38	This Court's **ORDER** granting such extension	06/08/00
ALJ EX 39	June 9, 2000 letter from Brenda Armstrong, Acting District Director referring the widow's claim for consolidation with the employee's claim	06/13/00
CX 39	Claimant's brief with attachments	07/03/00
EX 19	Employer's brief	07/03/00

EX 20	Employer's Motion to Strike[1]	07/17/00
CX 40	Claimant's response	07/17/00
CX 22	Attorney Nelson's Notice of Appearance	11/02/00

The record was closed on November 2, 2000 as no further documents were filed.

Stipulations and Issues

The parties stipulate (JX 1), and I find:

1. The Act applies to this proceeding.

2. Claimant and the Employer were in an employee-employer relationship at the relevant times.

3. Claimant alleges that her husband ("Decedent") suffered an injury in the course and scope of his maritime employment.

4. Claimant gave the Employer notice of the injury in a timely fashion.

5. No informal conference was held herein.

6. The applicable average weekly wage is $380.46, the National Average Weekly Wage as of the date of death.

7. Decedent passed away on May 31, 1995.

8. Claimant was a dependent of Decedent at the time of his death and she was married to Decedent at the time of his death.

9. Ingalls Shipbuilding, Inc. ("Employer") was the last maritime Employer of the Decedent.

10. Asbestos products were present at Ingalls Shipbuilding when Decedent was employed there.

The unresolved issues in this proceeding are:

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[1]The Motion to Strike is not granted as the attachments are relevant and material to the issues herein and as the objections really go to the weight to be accorded to the documents and they are admitted **de bene esse.**

1. Whether or not Decedent's asbestosis and lung cancer are causally related to his maritime employment.

2. If so, whether the claim for Death Benefits is barred by unapproved third party settlements, pursuant to Section 33(g)(1) of the Act.

3. If not, whether the Employer is entitled to a credit for pre-death settlements.

4. Attorney's fee, interest and other assessments.

Summary of the Evidence

D.A. Dearman ("Decedent" herein), who was born on April 2, 1926, worked for approximately seventeen (17) years as a welder at the Pascagoula, Mississippi shipyard of the Ingalls Shipbuilding, Inc., ("Employer"), a maritime facility adjacent to the navigable waters of the Pascagoula River and the Gulf of Mexico where the Employer builds, repairs and overhauls submarines. (CX 4) As a welder Decedent was exposed to and inhaled asbestos dust and fibers as a maritime employee. (JX 1) Decedent passed away on May 31, 1995 and Dr. Dayton E. Whites has certified "bronchogenic carcinoma" as the immediate cause of death. No other condition is identified on the Death Certificate. (CX 4)

Hattie Dearman ("Claimant"), Decedent's surviving widow (JX 1), testified herein by deposition (EX 9) and at the hearing before me. Claimant, who has been married three times, survived her first two husbands and she married Decedent on June 19, 1992. Decedent had ten (10) children, plus an adopted child, from his first marriage, one which ended in divorce. Claimant had five children during her marriages. Decedent, who had already retired at the time of their marriage on June 19, 1992 was, however, experiencing "lung problems" at that time and he "stayed in the hospital (at Hattiesburg) a good bit," Claimant remarking that some admissions lasted "a week or two weeks until they got him better." Dr. Jackson was Decedent's primary treating physician and Decedent "took medicine by handfuls," according to Claimant. Decedent was examined by a number of doctors and in March of 1995 the doctors told them that he had lung cancer. Decedent had no surgery for his lung problems. (EX 9 at 4-22; TR 37-38)

Claimant admitted that she and Decedent had filed so-called third-party suits against the manufacturers and distributors of

asbestos products, that he did receive some money as settlements prior to his death and that she has not received any money from these suits after his death. Claimant admitted that her husband did smoke cigarettes in the past but she did not know when he started, stopped or how much or how long he smoked. According to Claimant, her husband had experienced two heart attacks and was treated by Dr. White; both attacks occurred during their marriage. (EX 9 at 22-28; TR 39-53)

Decedent's medical records reflect that on April 28, 1990 he was examined by Dr. Henry K. Hillman, a family practitioner and the doctor reports as follows (CX 27):

Height 69", weight 175, age 64

DATES OF EXPOSURE: 1952-1969

This 64 year old white male presents at this time with dyspnea at rest, grade V (Patient becomes breathless when talking or is unable to leave his house because of breathlessness.). He has a cough primarily in the mornings which is nonproductive. He has 1-2 upper respiratory infections a year with frequent pleuritic chest pain.

PULMONARY HISTORY: He has had pneumonia several times. He had a chest x-ray 1-2 weeks ago at Green County Hospital which showed scattered pulmonary fibrosis. He has had a bronchoscopy at the VA Hospital in Jackson multiple times.

SMOKING HISTORY: He does not smoke but quit two years ago. No other history of chronic lung disease.

ASBESTOS EXPOSURE: As a worker at Ingalls without mask protection.
He currently takes no lung medications regularly.

FAMILY HISTORY: No family history of asbestosis...

LUNGS/CHEST: Auscultation reveals scattered diffuse rhonchi throughout both lung fields, most prominently posteriorly and superiorly.

CHEST X-RAY: Scattered pulmonary fibrosis as mentioned previously, most pronounced in the inferior area of both lung fields, posteriorly in the left lung field and thoracic spine area.

PULMONARY FUNCTION STUDIES: Forced vital capacity is 67% of predicted; DLCO shows severe reduction in diffusion capacity.

IMPRESSION: Based on the above data, I feel the patient has pulmonary asbestosis.

RECOMMENDATIONS: Annual followup by his physician or at this clinic, according to the doctor.

Dr. Richard S. Keubler, a NIOSH “B” radiologist, read Decedent’s June 9, 1992 chest x-ray as showing abnormal changes “compatible with pulmonary asbestosis.” (CX 29

Dr. Michael G. Conner examined Decedent on July 27, 1990 and the doctor reported as follows in his letter to the Decedent (CX 28):

...PRESENT HISTORY: The patient states he gets short of breath at rest after exercise. He would grade his degree of dyspnea as grade IV (Patient is unable to walk more than about 100 yards without rest), has a cough which is present at any time and is nonproductive. He gets about 3-4 colds per year. He complains of pleuritic chest pain. He takes some type of pulmonary medication four times a day, the name of which he does not remember.

PAST PULMONARY HISTORY: The patient had pneumonia 7-8 different times in the past. The episodes resulted in 6-7 day hospitalizations. He had a chest x-ray in 4/90 at Greene County Hospital but was not told the results of this. He had a bronchoscopy in 1974 at the VA Hospital in Jackson, results of which are not available.

SMOKING HISTORY: The patient stopped smoking two years ago. At that time he had a 20-25 year history of smoking one pack per day.

OCCUPATIONAL HISTORY: The patient worked as a welder/burner for 17 years and was exposed to asbestos in that fashion without benefit of a face mask or other protective gear.

PAST MEDICAL HISTORY: The patient has hypertension, heart disease and suffers from lumbosacral disc disease. He also has arthritis and decreased hearing. He takes a pulmonary medication of some type and also takes an antihypertensive, the name of whch he does not remember...

LUNGS: Bilateral crackling breath sounds in both posterior bases...

CHEST X-RAY: X-ray,reveals a pattern of pulmonary interstitial fibrosis of both right and left lower lung fields. In addition there is increased thickness of the pleura, particularly over

the left hemidiaphragmatic surface and there is also blunting of the costophrenic angle.

PULMONARY FUNCTION STUDIES: The PFTs reveal a pattern of both restrictive and obstructive lung disease. The diffusion capacity is severely decreased and measures a negative figure.

IMPRESSION: Asbestosis - This diagnosis is based upon the changes on chest x-ray and is also based upon the demonstration of restrictive disease and severe reduction in diffusion capacity.

RECOMMENDATIONS: It is recommended that this man undergo an annual reexamination either at this clinic or by his own physician.

Dr. Stephen Frazier, a radiologist, read Decedent's September 11, 1992 chest x-rays as showing (CX 31):

1. No evidence of acute infiltrates.

2. Severe interstitial lung disease.

3. However, compared to prior study of May 6, 1991, there appears to be no significant interval change.

Dr. Kenny Duff, a radiologist, read Decedent's July 18, 1994 chest x-rays as showing (CX 32):

1. No acute findings and with no significant change from the older study.

2. Emphysematous changes with chronic pleural and parenchymal changes in each hemithorax.

Decedent's pulmonary problems gradually worsened and on March 9, 1995 he was examined by Dr. Steven Stogner, a pulmonary specialist, and the doctor recommended fiberoptic bronchoscopy to evaluate a new neoplasm seen on Decedent's chest x-ray. As of March 29, 1995 the doctor gave the following impression after receiving the pathologist's report. (CX 30):

SUBJECTIVE: Mr. Dearman has been determined to have bronchogenic carcinoma. He underwent bronchoscopy which was non-diagnostic with a CT guided needle biopsy proved th diagnosis of large cell, undifferentiated carcinoma.

A bone scan showed some abnormalities on the right side of the chest, and indeed this may be metastatic disease as he is exquisitely painful over there. Rib details are pending.

Today, I discussed the results with the patient and his family. He voices an understanding of the meaning of bronchogenic carcinoma and agrees with my recommendation that he should have radiation treatment. I do not think that he should entertain surgical resection even if he does not have metastatic disease, because of his underlying poor health, etc.

OBJECTIVE: Physical exam, no change from previously. There is no adenopathy. Chest is actually clear.

ASSESSMENT:

1. Bronchogenic carcinoma right lung, large cell undifferentiated.
2. COPD.

PLAN:

1. Appointment with Drs. Fisher, Salloum for radiation therapy.
2. MRI of the brain.

We will see him again in 2 months just to see how things are going.

In the meantime, he is referred back to Dr. Jackson for continued care.

Dr. A.J. Jackson, a specialist in Internal Medicine, reported as follows in his May 2, 1995 Internal Medicine Consultation (CX 34):

This 69-year-old white male has been followed by me over the past few years. When I first saw the patient, he had COPD with evidence of bronchospasm and chronic bronchitis. He stopped smoking and these problems then pretty much straightened out. In the early months of this year, he started having some chest wall pain and discomfort. Later he was noted to have a hilar mass which turned out to be lung cancer. On April Ist, MRI was done that showed diffuse metastatic disease up and down the vertebral column. He has been receiving radiotherapy on outpatient basis and doing reasonably well. This morning, he apparently developed some hypertension, weakness, diaphoresis, and some substernal pain and discomfort. Because of this, he is admitted by Dr. Stogner for further delineation. At this time, the patient states "I feel rough”.

SOCIAL HISTORY: He does not smoke. He is married. He has children...

REVIEW OF SYSTEMS: HEENT: - No problems. Neck - No problems. Cardiopulmonary - see above. He does have a history of carotid

bruits which has been evaluated a couple of times. As I recall, he has some aortic arch difficulties and/or has carotid stenosis to the point that he is not felt to be an operative candidate. GI - No prior problems. GU - No problems...

IMPRESSION:

1. Carcinoma of the lung with diffuse metastatic disease to the axial skeleton.

2. Chronic obstruction pulmonary disease with emphysema and chronic bronchitis.

3. Arteriosclerotic cardiovascular disease.

4. Abdominal pain, weakness, discomfort, question whether this is early sepsis versus other.

At this time, he is on antibiotics, H2 antagonist, and is stable.
At this point, I would concur with continuing the same regimen for the moment. Will see the patient and make suggestions as appropriate, according to the doctor.

COPD, an enlarged right hilum, pleural thickening and/or capping were reported by Dr. Kelly Seid on May 8, 1995. (CX 35)

Decedent was hospitalized at Forrest General Hospital in Hattiesburg from May 2, 1995 to May 12, 1995 and Dr. Stogner reports as follows in the Discharge Summary (CX 36):

DIAGNOSES:
1. Bronchogenic carcinoma with bone metastases.
2. Dehydration.
3. Odynophagia secondary to esophagitis.
4. Possible liver metastases.

HPI & REASON FOR ADMISSION: This 69 year old white male was recently diagnosed with lung cancer, having Dr. A. J. Jackson as his primary care physician. Patient admitted with complaints of weakness and dyspnea on exertion, as well as sweats. He was noted to be hypotensive.

Physical exam revealed the patient to be hypotensive, mental status was within normal limits. He was somewhat congested on chest exam.
HOSPITAL COURSE: The patient was hydrated. His blood pressure medicine was discontinued. His appetite was poor. He had odynophagia secondary to esophagitis. Dr. Jackson saw the patient and it was felt he was receiving little benefit from the radiation treatment and wanted to go home under the hospice program and we felt like this was the best route for him.

MEDICATIONS: See list...

CONDITION ON DISCHARGE: Improved over that of admission with resolution of hypotension but continued severe malnourished state
secondary to cancer, according to the doctor.

Decedent was hospitalized on May 28, 1995 at George County Hospital for evaluation of “some difficulty swallowing” and a loss of appetite. He was brought to the Emergency Room by the EMS and Decedent was found to be a “poorly nourished male who is fairly unresponsive.” Dr. Joe L. Wilhite’s impression was “bronchogenic carcinoma with metastasis.” Decedent’s condition rapidly deteriorated and he passed away on May 31, 1995 of “metastatic bronchogenic carcinoma.” (CX 37)

On the basis of the totality of this record and having observed the demeanor and heard the testimony of a credible Claimant, I make the following:

Findings of Fact and Conclusions of Law

This Administrative Law Judge, in arriving at a decision in this matter, is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and he is not bound to accept the opinion or theory of any particular medical examiner. **Banks v. Chicago Grain Trimmers Association, Inc.**, 390 U.S. 459 (1968), **reh. denied**, 391 U.S. 929 (1969); **Todd Shipyards v. Donovan**, 300 F.2d 741 (5th Cir. 1962); **Scott v. Tug Mate, Incorporated**, 22 BRBS 164, 165, 167 (1989); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Anderson v. Todd Shipyard Corp.**, 22 BRBS 20, 22 (1989); **Hughes v. Bethlehem Steel Corp.**, 17 BRBS 153 (1985); **Seaman v. Jacksonville Shipyard, Inc.**, 14 BRBS 148.9 (1981); **Brandt v. Avondale Shipyards, Inc.**, 8 BRBS 698 (1978); **Sargent v. Matson Terminal, Inc.**, 8 BRBS 564 (1978).

The Act provides a presumption that a claim comes within its provisions. **See** 33 U.S.C. §920(a). This Section 20 presumption "applies as much to the nexus between an employee's malady and his employment activities as it does to any other aspect of a claim." **Swinton v. J. Frank Kelly, Inc.**, 554 F.2d 1075 (D.C. Cir. 1976), **cert. denied**, 429 U.S. 820 (1976). Claimant's uncontradicted credible testimony alone may constitute sufficient proof of physical injury. **Golden v. Eller & Co.**, 8 BRBS 846 (1978), **aff'd**, 620 F.2d 71 (5th Cir. 1980); **Hampton v. Bethlehem Steel Corp.**, 24 BRBS 141 (1990); **Anderson v. Todd Shipyards**, **supra**, at 21; **Miranda v. Excavation Construction, Inc.**, 13 BRBS 882 (1981).

However, this statutory presumption does not dispense with the requirement that a claim of injury must be made in the first instance, nor is it a substitute for the testimony necessary to establish a "**prima facie**" case. The Supreme Court has held that "[a] **prima facie** 'claim for compensation,' to which the statutory presumption refers, must at least allege an injury that arose in the course of employment as well as out of employment." **United States Indus./Fed. Sheet Metal, Inc., v. Director, Office of Workers' Compensation Programs, U.S. Dep't of Labor**, 455 U.S. 608, 615 102 S. Ct. 1318, 14 BRBS 631, 633 (CRT) (1982), **rev'g Riley v. U.S. Indus./Fed. Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). Moreover, "the mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer." **Id.** The presumption, though, is applicable once claimant establishes that he has sustained an injury, **i.e.**, harm to his body. **Preziosi v. Controlled Industries**, 22 BRBS 468, 470 (1989); **Brown v. Pacific Dry Dock Industries**, 22 BRBS 284, 285 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56, 59 (1985); **Kelaita v. Triple A. Machine Shop**, 13 BRBS 326 (1981).

To establish a **prima facie** claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that (1) the claimant sustained physical harm or pain and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. **Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984); **Kelaita**, **supra**. Once this **prima facie** case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. To rebut the presumption, the party opposing entitlement must present substantial evidence proving the absence of or severing the connection between such harm and employment or working conditions. **Parsons Corp. of California v. Director, OWCP**, 619 F.2d 38 (9th Cir. 1980); **Butler v. District Parking Management Co.**, 363 F.2d 682 (D.C. Cir. 1966); **Ranks v. Bath Iron Works Corp.**, 22 BRBS 301, 305 (1989); **Kier**, **supra**. Once claimant establishes a physical harm and working conditions which could have caused or aggravated the harm or pain the burden shifts to the employer to establish that claimant's condition was not caused or aggravated by his employment. **Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. **Del Vecchio v. Bowers**, 296 U.S. 280 (1935); **Volpe v. Northeast Marine Terminals**, 671 F.2d 697 (2d Cir. 1981); **Holmes v. Universal Maritime Serv. Corp.**, 29 BRBS 18 (1995). In such cases, I must weigh all of the evidence relevant to the causation issue. **Sprague v. Director, OWCP**, 688

F.2d 862 (1st Cir. 1982); **Holmes, supra**; **MacDonald v. Trailer Marine Transport Corp.**, 18 BRBS 259 (1986).

To establish a **prima facie** case for invocation of the Section 20(a) presumption, claimant must prove that (1) he suffered a harm, and (2) an accident occurred or working conditions existed which could have caused the harm. **See**, **e.g.**, **Noble Drilling Company v. Drake**, 795 F.2d 478, 19 BRBS 6 (CRT) (5th Cir. 1986); **James v. Pate Stevedoring Co.**, 22 BRBS 271 (1989). If claimant's employment aggravates a non-work-related, underlying disease so as to produce incapacitating symptoms, the resulting disability is compensable. **See Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986); **Gardner v. Bath Iron Works Corp.**, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981). If employer presents "specific and comprehensive" evidence sufficient to sever the connection between claimant's harm and his employment, the presumption no longer controls, and the issue of causation must be resolved on the whole body of proof. **See**, **e.g.**, **Leone v. Sealand Terminal Corp.**, 19 BRBS 100 (1986).

Employer contends that Claimant did not establish a **prima facie** case of causation and, in the alternative, that there is substantial evidence of record to rebut the Section 20(a), 33 U.S.C. §920(a), presumption. The Board has held that credible complaints of subjective symptoms and pain can be sufficient to establish the element of physical harm necessary for a **prima facie** case for Section 20(a) invocation. **See Sylvester v. Bethlehem Steel Corp.**, 14 BRBS 234, 236 (1981), **aff'd**, 681 F.2d 359, 14 BRBS 984 (5th Cir. 1982). Moreover, I may properly rely on Claimant's statements to establish that her husband experienced a work-related harm, and as it is undisputed that a work accident occurred which could have caused the harm, the Section 20(a) presumption is invoked in this case. **See**, **e.g.**, **Sinclair v. United Food and Commercial Workers**, 23 BRBS 148, 151 (1989).

The presumption of causation can be rebutted only by "substantial evidence to the contrary" offered by the employer. 33 U.S.C. § 920. What this requirement means is that the employer must offer evidence which **rules out the** connection between the alleged event and the alleged harm.[2] In **Caudill v. Sea Tac Alaska Shipbuilding**, 25 BRBS 92 (1991), the carrier offered a medical expert who testified that an employment injury

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[2]The U.S. Court of Appeals for the Fifth Circuit has rejected that "ruling out" burden. In this regard, **see Conoco, Inc. v. Director, OWCP (Prewitt)**, 194 F.3d 684, 33 BRBS 187 (CRT) (5th Cir. 1999).

did not "play a significant role" in contributing to the back trouble at issue in this case. The Board held such evidence insufficient as a matter of law to rebut the presumption because the testimony did not completely rule out the role of the employment injury in contributing to the back injury. **See also Cairns v. Matson Terminals, Inc.**, 21 BRBS 299 (1988) (medical expert opinion which did entirely attribute the employee's condition to non-work-related factors was nonetheless insufficient to rebut the presumption where the expert equivocated somewhat on causation elsewhere in his testimony). Where the employer/carrier can offer testimony which completely severs the causal link, the presumption is rebutted. **See Phillips v. Newport News Shipbuilding & Dry Dock Co.**, 22 BRBS 94 (1988) (medical testimony that claimant's pulmonary problems are consistent with cigarette smoking rather than asbestos exposure sufficient to rebut the presumption).

For the most part only medical testimony can rebut the Section 20(a) presumption. **But see Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989) (holding that asbestosis causation was not established where the employer demonstrated that 99% of its asbestos was removed prior to the claimant's employment while the remaining 1% was in an area far removed from the claimant and removed shortly after his employment began). Factual issues come in to play only in the employee's establishment of the **prima facie** elements of harm/possible causation and in the later factual determination once the Section 20(a) presumption passes out of the case.

Once rebutted, the presumption itself passes completely out of the case and the issue of causation is determined by examining the record "as a whole". **Holmes v. Universal Maritime Services Corp.**, 29 BRBS 18 (1995). Prior to 1994, the "true doubt" rule governed the resolution of all evidentiary disputes under the Act; where the evidence was in equipoise, all factual determinations were resolved in favor of the injured employee. **Young & Co. v. Shea**, 397 F.2d 185, 188 (5th Cir. 1968), **cert. denied,** 395 U.S. 920, 89 S. Ct. 1771 (1969). The Supreme Court held in 1994 that the "true doubt" rule violated the Administrative Procedure Act, the general statute governing all administrative bodies. **Director, OWCP v. Greenwich Collieries**, 512 U.S. 267, 114 S. Ct. 2251, 28 BRBS 43 (CRT) (1994). Accordingly, after **Greenwich Collieries** the employee bears the burden of proving causation by a preponderance of the evidence after the presumption is rebutted.

As Respondents dispute that the Section 20(a) presumption is invoked, **see Kelaita v. Triple A Machine Shop**, 13 BRBS 326 (1981), the burden shifts to Respondents to rebut the presumption with substantial evidence which establishes that

claimant's employment did not cause, contribute to, or aggravate his condition. **See Peterson v. General Dynamics Corp**., 25 BRBS 71 (1991), **aff'd sub nom. Insurance Company of North America v. U.S. Dept. of Labor**, 969 F.2d 1400, 26 BRBS 14 (CRT)(2d Cir. 1992), **cert. denied,** 507 U.S. 909, 113 S. Ct. 1264 (1993); **Obert v. John T. Clark and Son of Maryland,** 23 BRBS 157 (1990); **Sam v. Loffland Brothers Co.**, 19 BRBS 228 (1987). The unequivocal testimony of a physician that no relationship exists between an injury and a claimant's employment is sufficient to rebut the presumption. **See Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984). If an employer submits substantial countervailing evidence to sever the connection between the injury and the employment, the Section 20(a) presumption no longer controls and the issue of causation must be resolved on the whole body of proof. **Stevens v. Tacoma Boatbuilding Co.**, 23 BRBS 191 (1990).

In the case **sub judice**, Claimant alleges that the harm to her husband's bodily frame, **i.e.**, his asbestosis and bronchogenic carcinoma, resulted from working conditions or resulted from his exposure to and inhalation of asbestos at the Employer's shipyard. The Respondents have introduced evidence severing the connection between such harm and Claimant's maritime employment. Thus, the presumption falls out of the case, does not control the result and I shall now review all of the record evidence.

Injury

The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury. **See** 33 U.S.C. §902(2); **U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers Compensation Programs, U.S. Department of Labor**, 455 U.S. 608, 102 S.Ct. 1312 (1982), **rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). A work-related aggravation of a pre-existing condition is an injury pursuant to Section 2(2) of the Act. **Gardner v. Bath Iron Works Corporation**, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385 (1st Cir. 1981); **Preziosi v. Controlled Industries**, 22 BRBS 468 (1989); **Januszewicz v. Sun Shipbuilding and Dry Dock Company**, 22 BRBS 376 (1989) (**Decision and Order on Remand**); **Johnson v. Ingalls Shipbuilding**, 22 BRBS 160 (1989); **Madrid v. Coast Marine Construction**, 22 BRBS 148 (1989). Moreover, the employment-related injury need not be the sole cause, or primary factor, in a disability for compensation purposes. Rather, if an employment-related injury contributes to, combines with or aggravates a pre-existing disease or underlying condition, the entire resultant disability is compensable. **Strachan Shipping**

v. Nash, 782 F.2d 513 (5th Cir. 1986); **Independent Stevedore Co. v. O'Leary**, 357 F.2d 812 (9th Cir. 1966); **Kooley v. Marine Industries Northwest**, 22 BRBS 142 (1989); **Mijangos v. Avondale Shipyards, Inc.**, 19 BRBS 15 (1986); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). Also, when claimant sustains an injury at work which is followed by the occurrence of a subsequent injury or aggravation outside work, employer is liable for the entire disability if that subsequent injury is the natural and unavoidable consequence or result of the initial work injury. **Bludworth Shipyard, Inc. v. Lira**, 700 F.2d 1046 (5th Cir. 1983); **Mijangos**, **supra**; **Hicks v. Pacific Marine & Supply Co.**, 14 BRBS 549 (1981). The term injury includes the aggravation of a pre-existing non-work-related condition or the combination of work- and non-work-related conditions. **Lopez v. Southern Stevedores**, 23 BRBS 295 (1990); **Care v. WMATA**, 21 BRBS 248 (1988).

In occupational disease cases, there is no "injury" until the accumulated effects of the harmful substance manifest themselves and claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease and the death or disability. **Travelers Insurance Co. v. Cardillo**, 225 F.2d 137 (2d Cir. 1955), **cert. denied**, 350 U.S. 913 (1955). **Thorud v. Brady-Hamilton Stevedore Company, et al.**, 18 BRBS 232 (1987); **Geisler v. Columbia Asbestos, Inc.**, 14 BRBS 794 (1981). Nor does the Act require that the injury be traceable to a definite time. The fact that claimant's injury occurred gradually over a period of time as a result of continuing exposure to conditions of employment is no bar to a finding of an injury within the meaning of the Act. **Bath Iron Works Corp. v. White**, 584 F.2d 569 (1st Cir. 1978).

Claimant has offered the July 19, 1997 report of Dr. Jay T. Segarra, Board Certified in Internal Medicine, Pulmonary Diseases and Critical Care, and the doctor who also is a NIOSH Certified B-Reader of chest x-rays, reports as follows in his letter to Claimant’s law firm (CX 22):

Source of Information: A Letter from the Firm; Medical Records from George County Hospital in Lucedale, MS; Medical Records from the Hattiesburg Clinic in Hattiesburg, MS; Medical Records from Forrest General Hospital in Hattiesburg, MS; a Death Certificate; and a Letter from the Firm.

D. A. Dearman was a 69-year-old man at the time of his death from lung cancer on May 31, 1995. He reported exposure to asbestos materials during his work as a shipyard welder from 1952 to 1969. He was a smoker up until 1988. In March of 1995, he presented with a mass in the right lung. At that time, he was

noted to have a past medical history of tuberculosis treated in the 1970's, hypertension, osteoarthritis, and emphysema. His medications at that time included Theophylline, aspirin, Humibid, Levsin, Calan, Lasix, Lotensin, Quinine, Tornalate, Beclovent and Volmax. Spirometry demonstrated mild air flow obstruction with normal oxygen saturation. After a negative bronchoscopy, a CT-guided needle biopsy demonstrated large cell carcinoma of the lung. This was treated with primary radiation therapy, but he died less than three months after his diagnosis.

Of interest, chest x-ray reports reveal emphysema as well as "scattered fibrosis". Another chest x-ray report from 03/02/93 mentions "scarring in both lungs". Another chest x-ray report from Dr. John T. Renz dated 04/27/93 reports..scattered increased lung markings ... most suggestive for pulmonary parenchymal fibrosis. These findings were reiterated on a report dated 08/22/94. Pleural thickening was noted by Dr. L. McVay of Lucedale, Mississippi on 08/24/94. Chronic interstitial changes were also mentioned by Dr. K. Duff of the Hattiesburg Clinic in March of 1995. Dr. Duff, commenting previous on 07/18/94, describes "emphysematous changes with chronic pleural and parenchymal changes in each hemithorax". Dr. S. Frazier of the Hattiesburg Clinic describes "severe interstitial lung disease" on a chest x-ray dated 09/11/92, as well as changes suggestive of chronic obstructive pulmonary disease (COPD). Thus, although I have not reviewed actual chest x-rays or chest CT scans, there is abundant evidence in the clinical record that Mr. Dearman had significant pulmonary interstitial fibrosis,' which, in a subject with known occupational asbestos exposure, is consistent with pulmonary parenchymal asbestosis.

In my opinion, the occurrence of Mr. Dearman's fatal lung cancer was causally related, at least in part, to his previous asbestos exposure. This statement is based on the standard epidemiologic association between occupational exposure to asbestos materials and increased risk for lung cancer of all cells types, a risk that is multiplicatively enhanced in a dose-response fashion through cigarette smoking. In addition, the causal relationship is strengthened when there is either pathologic or radiographic evidence for parenchymal asbestosis, or, to a somewhat lesser extent, asbestos-related pleural disease, according to the doctor.

Claimant has also offered the July 8, 1999 report of Dr. Richard Kradin and the doctor states as follows in his letter to Claimant’s attorney (CX 20):

Dr. Richard Kradin, after reviewing Decedent’s medical records, concluded that Decedent’s lung cancer was “considered an asbestos-related neoplasm and attributed to the combined effects of asbestos and cigarette smoke,” although the doctor

candidly remarked that it was “not possible to establish a pathological diagnosis in this case, as the only tissue available is a tiny core of tumor which would not be expected to show evidence of asbestos or increased asbestos levels.” (CX 20 at 2)

The doctor’s nine (9) page **Curriculum Vitae** is in evidence as CX 21.

The Employer has had the Decedent’s medical records reviewed by its medical expert, Dr. Robert N. Jones, a Professor of Medicine at the Tulane University Medical Center, New Orleans, and the doctor concludes as follows in his December 15, 1998 letter to Employer’s counsel, (EX 5)(the doctor’s **Curriculum Vitae** is in evidence as EX 6):

Dr. Jones, after reviewing Decedent’s medical records, concluded that Decedent “contracted and died of lung cancer,” that “the only risk factors identifiable with reasonable medical certainty are his past cigarette smoking (far and away the major factor) and scarring from past infections,” that Decedent’s “CT scan ... shows no radiographic asbestosis” and that “(t)here is no diagnosis of asbestosis and no sound or reasonably certain basis for attributing the cancer in part to asbestos exposures.” (EX s5 at 5)

This closed record conclusively establishes, and I so find and conclude, that Decedent’s asbestosis and lung cancer do not constitute a work-related injury.

This Administrative Law Judge, in so concluding, accepts the well-reasoned and well-documented opinion of Dr. Jones, a pre-eminent pulmonary specialist, that Decedent’s chest x-rays do not show radiographic evidence of an asbestos-related disease and that the lung cancer is due **solely** to Decedent’s extensive cigarette smoking history.

I have given greater weight to the opinions of Dr. Jones as opposed to those of the Decedent’s medical experts and as the evidence is “in equipose” and as I no longer invoke the true doubt rule, Claimant has not borne her burden of proof, within the meaning and intent of **Greenwich Collieries, supra**, and **Maher Terminals, supra**, and thus her claim must be denied.

As noted, I have also accepted and credited the reasons given by Dr. Jones for rejecting Claimant’s medical evidence, and those reasons are incorporated herein by preference.

However, in the event that reviewing authorities should hold that **Conoco, supra,** is not applicable herein, I would further find

that the date of injury for his alleged injury is April 28, 1990 (CX 27), that Decedent timely filed a claim for such injury on or about that date (EX 14), that the date of injury for his lung cancer is March 25, 1995 (CX 30), that Claimant and Decedent timely filed for benefits for such injury and death on or about December 1, 1995 (CX 4), that the Employer and Carrier had timely notice of such injuries and death and that the Respondents timely controverted the entitlement to benefits by the Claimant and Decedent. (EX 1 - EX 3)

In this proceeding no benefits are being sought for the Decedent and Claimant seeks Death Benefits for herself only. (TR 22)

Nature and Extent of Disability

It is axiomatic that disability under the Act is an economic concept based upon a medical foundation. **Quick v. Martin**, 397 F.2d 644 (D.C. Cir. 1968); **Owens v. Traynor**, 274 F. Supp. 770 (D.Md. 1967), **aff'd**, 396 F.2d 783 (4th Cir. 1968), **cert. denied**, 393 U.S. 962 (1968). Thus, the extent of disability cannot be measured by physical or medical condition alone. **Nardella v. Campbell Machine, Inc.**, 525 F.2d 46 (9th Cir. 1975). Consideration must be given to claimant's age, education, industrial history and the availability of work he can perform after the injury. **American Mutual Insurance Company of Boston v. Jones**, 426 F.2d 1263 (D.C. Cir. 1970). Even a relatively minor injury may lead to a finding of total disability if it prevents the employee from engaging in the only type of gainful employment for which he is qualified. (**Id**. at 1266)

Average Weekly Wage

For the purposes of Section 10 and the determination of the employee's average weekly wage with respect to a claim for compensation for death or disability due to an occupational disability, the time of injury is the date on which the employee or claimant becomes aware, or on the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease, and the death or disability. **Todd Shipyards Corp. v. Black**, 717 F.2d 1280 (9th Cir. 1983); **Hoey v. General Dynamics Corporation**, 17 BRBS 229 (1985); **Pitts v. Bethlehem Steel Corp.**, 17 BRBS 17 (1985); **Yalowchuck v. General Dynamics Corp.**, 17 BRBS 13 (1985).

The 1984 Amendments to the Longshore Act apply in a new set of rules in occupational disease cases where the time of injury (**i.e.**, becomes manifest) occurs after claimant has retired. **See Woods v. Bethlehem Steel Corp.**, 17 BRBS 243 (1985); 33 U.S.C. §§902(10), 908(C)(23), 910(d)(2). In such cases, disability is

defined under Section 2(10) not in terms of loss of earning capacity, but rather in terms of the degree of physical impairment as determined under the guidelines promulgated by the American Medical Association. An employee cannot receive total disability benefits under these provisions, but can only receive a permanent partial disability award based upon the degree of physical impairment. **See** 33 U.S.C. §908(c)(23); 20 C.F.R. §702.601(b). The Board has held that, in appropriate circumstances, Section 8(c)(23) allows for a permanent partial impairment award based on a one hundred (100) percent physical impairment. **Donnell v. Bath Iron Works Corporation**, 22 BRBS 136 (1989). Further, where the injury occurs more than one year after retirement, the average weekly wage is based on the National Average Weekly Wage as of the date of awareness rather than any actual wages received by the employee. **See** 33 U.S.C. §910(c)(2)(B); **Taddeo v. Bethlehem Steel Corp.**, 22 BRBS 52 (1989); **Smith v. Ingalls Shipbuilding**, 22 BRBS 46 (1989). Thus, it is apparent that Congress, by the 1984 Amendments, intended to expand the category of claimants entitled to receive compensation to include voluntary retirees.

However, in the case at bar, Decedent may be an involuntary retiree if he left the workforce because of work-related pulmonary problems. Thus, an employee who involuntarily withdraws from the workforce due to an occupational disability may be entitled to total disability benefits although the awareness of the relationship between disability and employment did not become manifest until after the involuntary retirement. In such cases, the average weekly wage is computed under 33 U.S.C. §910(C) to reflect earnings prior to the onset of disability rather than earnings at the later time of awareness. **MacDonald v. Bethlehem Steel Corp.**, 18 BRBS 181, 183 and 184 (1986). **Compare LaFaille v. General Dynamics Corp.**, 18 BRBS 882 (1986), **rev'd in relevant part sub nom. LaFaille v. Benefits Review Board**, 884 F.2d 54, 22 BRBS 108 (CRT) (2d Cir. 1989).

Thus, where disability commences on the date of involuntary withdrawal from the workforce, claimant's average weekly wage should reflect wages prior to the date of such withdrawal under Section 10(c), rather than the National Average Weekly Wage under Section 10(d)(2)(B).

However, if the employee retires due to a non-occupational disability prior to manifestation, then he is a voluntary retiree and is subject to the post-retirement provisions. In **Woods v. Bethlehem Steel Corp.**, 17 BRBS 243 (1985), the Benefits Review Board applied the post-retirement provisions because the employee retired due to disabling non-work-related heart disease prior to the manifestation of work-related asbestosis.

Decedent is a so-called voluntary retiree as he was in relatively good health at the time of his retirement and subsequent marriage on June 19, 1992 and as his lung cancer was not diagnosed until March 29, 1995. Accordingly, Death Benefits would be based upon the National Average Weekly Wage as of that date, or $380.46 (JX 1) and shall commence on the day of death, as further discussed below.

Death Benefits and Funeral Expenses Under Section 9

Pursuant to the 1984 Amendments to the Act, Section 9 provides Death Benefits to certain survivors and dependents if a work-related injury causes an employee's death. This provision applies with respect to any death occurring after the enactment date of the Amendments, September 28, 1984. 98 Stat. 1655. The provision that Death Benefits are payable only for deaths due to employment injuries is the same as in effect prior to the 1972 Amendments. The carrier at risk at the time of decedent's injury, not at the time of death, is responsible for payment of Death Benefits. **Spence v. Terminal Shipping Co.**, 7 BRBS 128 (1977), **aff'd sub nom. Pennsylvania National Mutual Casualty Insurance Co. v. Spence**, 591 F.2d 985, 9 BRBS 714 (4th Cir. 1979), **cert. denied**, 444 U.S. 963 (1975); **Marshall v. Looney's Sheet Metal Shop**, 10 BRBS 728 (1978), **aff'd sub nom. Travelers Insurance Co. v. Marshall**, 634 F.2d 843, 12 BRBS 922 (5th Cir. 1981).

A separate Section 9 claim must be filed in order to receive benefits under Section 9. **Almeida v. General Dynamics Corp.**, 12 BRBS 901 (1980). This Section 9 claim must comply with Section 13. **See Wilson v. Vecco Concrete Construction Co.**, 16 BRBS 22 (1983); **Stark v. Bethlehem Steel Corp.**, 6 BRBS 600 (1977). Section 9(a) provides for reasonable funeral expenses not exceeding $3,000. 33 U.S.C.A. §909(a) (West 1986). Prior to the 1984 Amendments, this amount was $1,000. This subsection contemplates that payment is to be made to the person or business providing funeral services or as reimbursement for payment for such services, and payment is limited to the actual expenses incurred up to $3,000. Claimant is entitled to appropriate interest on funeral benefits untimely paid. **Adams v. Newport News Shipbuilding and Dry Dock Company**, 22 BRBS 78, 84 (1989).

Section 9(b) which provides the formula for computing Death Benefits for surviving spouses and children of Decedents must be read in conjunction with Section 9(e) which provides minimum benefits. **Dunn v. Equitable Equipment Co.**, 8 BRBS 18 (1978);

Lombardo v. Moore-McCormack Lines, Inc., 6 BRBS 361 (1977); **Gray v. Ferrary Marine Repairs**, 5 BRBS 532 (1977).

Section 9(e), as amended in 1984, provides a maximum and minimum death benefit level. Prior to the 1972 Amendments, Section 9(e) provided that in computing Death Benefits, the average weekly wage of Decedent could not be greater than $105 nor less than $27, but total weekly compensation could not exceed Decedent's weekly wages. Under the 1972 Amendments, Section 9(e) provided that in computing Death Benefits, Decedent's average weekly wage shall not be less than the National Average Weekly Wage under Section 6(b), but that the weekly death benefits shall not exceed decedent's actual average weekly wage. **See Dennis v. Detroit Harbor Terminals**, 18 BRBS 250 (1986), **aff'd sub nom. Director, OWCP v. Detroit Harbor Terminals, Inc.**, 850 F.2d 283 21 BRBS 85 (CRT) (6th Cir. 1988); **Dunn, supra**; **Lombardo, supra**; **Gray, supra**.

In **Director, OWCP v. Rasmussen**, 440 U.S. 29, 9 BRBS 954 (1979), **aff'g** 567 F.2d 1385, 7 BRBS 403 (9th Cir. 1978), **aff'g sub nom. Rasmussen v. GEO Control, Inc.**, 1 BRBS 378 (1975), the Supreme Court held that the maximum benefit level of Section 6(b)(1) did not apply to Death Benefits, as the deletion of a maximum level in the 1972 Amendment was not inadvertent. The Court affirmed an award of $532 per week, two-thirds of the employee's $798 average weekly wage.

However, the 1984 amendments have reinstated that maximum limitation and Section 9(e) currently provides that average weekly wage shall not be less than the National Average Weekly Wage, but benefits may not exceed the lesser of the average weekly wage of Decedent or the benefits under Section 6(b)(1).

In view of these well-settled principles of law, and only as alternate findings, I would find and conclude that Claimant, as the surviving Widow of Decedent, would be entitled to an award of Death Benefits, commencing on March 31, 1995, the date of her husband's death, based upon the Decedent's National Average Weekly Wage $380.44 as of that date, pursuant to Section 9, as I would find and conclude that Decedent's death resulted from a combination of his work-related pulmonary asbestosis and lung cancer which conditions were first diagnosed and reported by Dr. Stogner during Decedent's hospitalization. The Death Certificate certifies as the immediate cause of death, bronchogenic carcinoma. (CX 4) Thus, I would find and conclude that Decedent's death resulted from and was related to his work-related injury on March 31, 1995.

Interest

Although not specifically authorized in the Act, it has been accepted practice that interest at the rate of six (6) percent per annum is assessed on all past due compensation payments. **Avallone v. Todd Shipyards Corp.**, 10 BRBS 724 (1978). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to ensure that the employee receives the full amount of compensation due. **Watkins v. Newport News Shipbuilding & Dry Dock Co.**, 8 BRBS 556 (1978), **aff'd in pertinent part** and **rev'd on other grounds sub nom. Newport News v. Director, OWCP**, 594 F.2d 986 (4th Cir. 1979); **Santos v. General Dynamics Corp.**, 22 BRBS 226 (1989); **Adams v. Newport News Shipbuilding**, 22 BRBS 78 (1989); **Smith v. Ingalls Shipbuilding**, 22 BRBS 26, 50 (1989); **Caudill v. Sea Tac Alaska Shipbuilding**, 22 BRBS 10 (1988); **Perry v. Carolina Shipping**, 20 BRBS 90 (1987); **Hoey v. General Dynamics Corp.**, 17 BRBS 229 (1985). The Board concluded that inflationary trends in our economy have rendered a fixed six percent rate no longer appropriate to further the purpose of making claimant whole, and held that ". . . the fixed six percent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. §1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills . . . ." **Grant v. Portland Stevedoring Company**, 16 BRBS 267, 270 (1984), **modified on reconsideration**, 17 BRBS 20 (1985). Section 2(m) of Pub. L. 97-258 provided that the above provision would become effective October 1, 1982. This Order incorporates by reference this statute and provides for its specific administrative application by the District Director. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

The Benefits Review Board has held that the employer must pay appropriate interest on untimely paid funeral benefits as funeral expenses are "compensation" under the Act. **Adams v. Newport News Shipbuilding**, 22 BRBS 78, 84 (1989).

Medical Expenses

An Employer found liable for the payment of compensation is, pursuant to Section 7(a) of the Act, responsible for those medical expenses reasonably and necessarily incurred as a result of a work-related injury. **Perez v. Sea-Land Services, Inc.**, 8 BRBS 130 (1978). The test is whether or not the treatment is recognized as appropriate by the medical profession for the care and treatment of the injury. **Colburn v. General Dynamics Corp.**, 21 BRBS 219, 22 (1988); **Barbour v. Woodward & Lothrop, Inc.**, 16 BRBS 300 (1984). Entitlement to medical services is never time-barred where a disability is related to a compensable injury. **Addison v. Ryan-Walsh Stevedoring Company**, 22 BRBS 32, 36 (1989); **Mayfield v. Atlantic & Gulf Stevedores**, 16 BRBS 228

(1984); **Dean v. Marine Terminals Corp.**, 7 BRBS 234 (1977). Furthermore, an employee's right to select his own physician, pursuant to Section 7(b), is well settled. **Bulone v. Universal Terminal and Stevedore Corp.**, 8 BRBS 515 (1978). Claimant is also entitled to reimbursement for reasonable travel expenses in seeking medical care and treatment for his work-related injury. **Tough v. General Dynamics Corporation**, 22 BRBS 356 (1989); **Gilliam v. The Western Union Telegraph Co.**, 8 BRBS 278 (1978).

In **Shahady v. Atlas Tile & Marble**, 13 BRBS 1007 (1981), **rev'd on other grounds**, 682 F.2d 968 (D.C. Cir. 1982), **cert. denied**, 459 U.S. 1146, 103 S.Ct. 786 (1983), the Benefits Review Board held that a claimant's entitlement to an initial free choice of a physician under Section 7(b) does not negate the requirement under Section 7(d) that claimant obtain employer's authorization prior to obtaining medical services. **Banks v. Bath Iron Works Corp.**, 22 BRBS 301, 307, 308 (1989); **Jackson v. Ingalls Shipbuilding Division, Litton Systems, Inc.**, 15 BRBS 299 (1983); **Beynum v. Washington Metropolitan Area Transit Authority**, 14 BRBS 956 (1982). However, where a claimant has been refused treatment by the employer, he need only establish that the treatment he subsequently procures on his own initiative was necessary in order to be entitled to such treatment at the employer's expense. **Atlantic & Gulf Stevedores, Inc. v. Neuman**, 440 F.2d 908 (5th Cir. 1971); **Matthews v. Jeffboat, Inc.**, 18 BRBS at 189 (1986).

An employer's physician's determination that Claimant is fully recovered is tantamount to a refusal to provide treatment. **Slattery Associates, Inc. v. Lloyd**, 725 F.2d 780 (D.C. Cir. 1984); **Walker v. AAF Exchange Service**, 5 BRBS 500 (1977). All necessary medical expenses subsequent to employer's refusal to authorize needed care, including surgical costs and the physician's fee, are recoverable. **Roger's Terminal and Shipping Corporation v. Director, OWCP**, 784 F.2d 687 (5th Cir. 1986); **Anderson v. Todd Shipyards Corp.**, 22 BRBS 20 (1989); **Ballesteros v. Willamette Western Corp.**, 20 BRBS 184 (1988).

Section 7(d) requires that an attending physician file the appropriate report within ten days of the examination. Unless such failure is excused by the fact-finder for good cause shown in accordance with Section 7(d), claimant may not recover medical costs incurred. **Betz v. Arthur Snowden Company**, 14 BRBS 805 (1981). **See also** 20 C.F.R. §702.422. However, the employer must demonstrate actual prejudice by late delivery of the physician's report. **Roger's Terminal**, **supra**.

On the basis of the totality of the record, I would find and conclude that Claimant has shown good cause, pursuant to Section 7(d). Claimant advised the Employer of her husband’s work-

related injury in a timely fashion and requested appropriate medical care and treatment. However, the Respondents did not accept the claim and did not authorize such medical care. Thus, any failure by Claimant to file timely the physician's report is excused for good cause as a futile act and in the interests of justice as the Employer refused to accept the claim.

Section 14(e)

Claimant is not entitled to an award of additional compensation, pursuant to the provisions of Section 14(e), as the Respondents timely controverted Claimant's entitlement to benefits. (EX 1 - EX 3) **Ramos v. Universal Dredging Corporation**, 15 BRBS 140, 145 (1982); **Garner v. Olin Corp.**, 11 BRBS 502, 506 (1979).

As alternate grounds for denying this claim is the fact that Claimant and Decedent settled a number of so-called third party settlements without approval from the Employer and in violation of the landmark decision in **Ingalls Shipbuilding, Inc. v. Director, OWCP (Yates),** 519 U.S. 248, 31 BRBS 5 (CRT) (1997). As Claimant has not complied with the provisions of Sections 33(g)(1) and (g)(2), her claim for Death Benefits must be denied. **See also Estate of Cowart v. Nicklas Drilling Co.,** 505 U.S. 469, 26 BRBS 49 (CRT)(1992).

It is undisputed that Claimant failed to give that notice to the Employer as is required by Section 33, that the Employer learned of these settlements only after supplemental discovery shortly before the hearing, that settlement proceeds were received by Claimant's third-party law firm and held for the Claimant for over one year, that the funds were returned only after the Employer learned of their existence and that such holding of the money constitutes a settlement because Claimant's law firm had full authority to act for the Claimant. (EX 13) Moreover, it is also obvious that the money was being returned in anticipation that "the LHWCA claims will be resolved by that time and the heirs will be able to accept the payments." (EX 15 at 10, 18)

While Claimant submits that those were pre-death settlements, the fact remains that the proceeds were paid well after death and were held for over one year by the law firm, apparently to await the outcome herein. I also note that the law firm treated the amounts as a settlement. In this regard, **see** the letter of December 13, 1999 from the firm of Maples and Lomax referring to the amount being returned as "U.C. Realty **settlements** for the plaintiffs listed below. (EX 11 at 14) The words "settlement monies" are also used on EX 11 at 15. The phrase "U.C. Realty Corporation Settlement" is used on EX 11 at 16.

The Employer has filed an excellent brief as to why the claim for Death Benefits must be denied and I adopt that reasoning as my own. On the other hand, the cases cited in Claimant's brief are clearly distinguishable herein and are given little or no weight by me, especially as this case arises within the jurisdiction of the U.S. Court of Appeals for the Fifth Circuit and as Employer has cited a number of pertinent holdings from that Court.

Accordingly, in view of the foregoing, I find and conclude that the claim for Death Benefits must be denied, and the same shall be **DENIED.**

ENTITLEMENT

Since Claimant has not established a **prima facie** claim of injury, she is not entitled to Death Benefits in this proceeding and her claim for benefits is hereby **DENIED**. As noted above, as alternate grounds, I would find and conclude that the claim for Death Benefits must be denied for Claimant's failure to comply with Sections 33(g)(1) and (g)(2).

The rule that all doubts must be resolved in Claimant's favor does not require that this Administrative Law Judge always find for Claimant when there is a dispute or conflict in the testimony. It merely means that, if doubt about the proper resolution of conflicts remains in the Administrative Law Judge's mind, these doubts should be resolved in Claimant's favor. **Hodgson v. Kaiser Steel Corporation**, 11 BRBS 421 (1979). Furthermore, the mere existence of conflicting evidence does not, **ipso facto**, entitle a Claimant to a finding in his favor. **Lobin v. Early-Massman**, 11 BRBS 359 (1979).

While claimant correctly asserts that all doubtful fact questions are to be resolved in favor of the injured employee, the mere presence of conflicting evidence does not require a conclusion that there are doubts which must be resolved in claimant's favor. **See Hislop v. Marine Terminals Corp**., 14 BRBS 927 (1982). Rather, before applying the "true doubt" rule, the Benefits Review Board has held that this Administrative Law Judge should attempt to evaluate the conflicting evidence. **See Betz v. Arthur Snowden Co**., 14 BRBS 805 (1981). [Moreover, the U.S. Supreme Court has abolished the "true doubt" rule in **Maher Terminals, Inc. v. Director, OWCP,** 512 U.S. 267, 114 S.Ct. 2251, 28 BRBS 43 (CRT)(1994), **aff'g** 992 F.2d 1277, 27 BRBS 1 (CRT)(3d Cir. 1993)].

As Claimant has not successfully prosecuted this claim, her attorney is not entitled to a fee award.

ORDER

It is therefore **ORDERED** that the claim for compensation benefits filed by Hattie Dearman is hereby **DENIED**.

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DAVID W. DI NARDI
Administrative Law Judge

Dated: December 12, 2000
Boston, Massachusetts
DWD:dr